BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RUBY BARNES AND OTHERS
(Claimants)
(See Appendices)

S.S.A. No.
(See Appendices)

PITTSBURG UNIFIED SCHOOL DISTRICT
(Employer)
c/o Reed, Roberts Associates

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No.
OAK-16602-1 & Others

PRECEDENT
BENEFIT DECISION
No. P-B-431
Case No. 81-9806

The employer appealed from that portion of the decision of the administrative law judge which held that all of the claimants were not ineligible for unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code. The Department appealed from that portion of the decision which held that the claimants in Appendix No. 1 were not ineligible for benefits under section 1253.3 of the code.

STATEMENT OF FACTS

Each of the claimants herein has worked for the captioned employer for various periods of time. Each has performed services in various capacities. The claimants in Appendix No. 1 performed services as clerks or secretaries. The claimants in Appendix No. 2 worked in the capacity of media aides, bilingual instructional aides, special educational aides and other similar positions.

(For LO & BYB See Appendices)

Each of the clerks and secretaries worked for the employer 12 months each year until 1978. In the summer of that year their employment was reduced to 11 months. During the month they did not work they were told they were laid off. They filed for unemployment and eventually collected. In the summer of 1979 the claimants were again "laid off." This time, however, their school year was reduced from 11 months to 10 months. Again they filed for unemployment benefits and collected benefits. The school year remained at 10 months and in the summer of 1980 the claimants filed and received unemployment benefits again. The present case involves claims for unemployment benefits in the summer of 1981.

In July 1981 some of the clerks and secretaries were sent a notice indicating that their performance the previous academic year was appreciated and they had reasonable assurance of returning to work in the fall of 1981. Each of the claimants expected to return to work in the fall but was not employed for two months during the summer. They were not paid for the period of unemployment. Each of these claimants considered that her employment was on a 12-month basis and she was then laid off during the summertime for two months. At the time this action occurred they had pending an unfair labor practice against the Pittsburg Unified School District that was unresolved. They had been advised by their union representative (California School Employees Association) that they were 12-month employees. Also during this time a position arose entitled "Clerical Aide." Various claimants were asked whether they wished to apply and some indicated they did not. This was a full-time 12-month position. Four claimants, Blakemore (No. 5), Mather (No. 24), Quesada (No. 26), and Hill (No. 21), refused to consider this position because they considered it a demotion either in rate of pay or job responsibility. The district did not consider this a demotion.

The claimants in Appendix No. 2 worked as instructional aides in the school year 1980-81. They were sent notice on May 1, 1981, thanking them for their services and indicating they were going to be reemployed in the school year beginning September 1981. They were told they would be "instructional aides." On August 15 some of these people were sent another notice which indicated their first workday would be September 1, 1981. That notice provides in pertinent part the following:

"Notwithstanding any other provisions herein, employment is subject to the continued satisfactory performance and/or special funding of this project. If funding ceases or is reduced the employee is subject to termination."

Testimony offered on behalf of the instructional aides indicates their positions have changed in various respects which would include hours, pay or responsibility. Some of these people, however, indicated that their positions were not specifically laid out in the notices they received except Claimant Greenup (No. 20) [she was told she would be a media aide as of August 15].

The employer indicated that the positions of the aides were subject to funding. As of the day before the hearing funding of some of these positions was not certain but it was felt that funding would be approved. The bilingual aides, however, have not been funded by the federal government but there are funds to reemploy the bilingual aides for one month [there are excess funds carried over from the last academic year]. All these positions are subject to federal funding. Claimant Camarillo (No. 7) was a community liaison bilingual person who received notice that she would be reinstated in the fall of 1981, but in fact was laid off effective August 24, 1981 but told that she could resume her position as bilingual aide.

REASONS FOR DECISION

Section 1253.3 of the California Unemployment Insurance Code provides that:

"(a) Notwithstanding any other provision of this division, unemployment compensation benefits, extended duration benefits, and federal-state extended benefits are payable on the basis of service to which Section 3309(a)(1) of the Internal Revenue Code of 1954 applies, in the same amount, on the same terms, and subject to the same conditions as such benefits payable on the basis of other service subject to this division, except as provided by this section.

"(b) Benefits specified by subdivision (a) of this section based on service performed in the employ of a nonprofit organization, or of any public entity as defined by Section 605, with respect to service in an instructional, research, or principal administrative capacity for an educational institution shall not be payable to any individual with respect to any week which begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms.

"(c) Benefits specified by subdivision (a) of this section based on service performed in the employ of a nonprofit organization, or of any public entity as defined by Section 605, with respect to service in any other capacity than specified in subdivision (b) for an educational institution (other than an institution of higher education) shall not be payable to any individual with respect to any week which commences during a period between two successive academic years or terms if such individual performs such service in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such service in the second of such academic years or terms."

* * *

"(f) For purposes of this section, to the extent permitted by federal law, 'reasonable assurance' includes, but is not limited to, an offer of employment made by the educational institution, provided, that such offer is not contingent on enrollment, funding, or program changes."

The claimants herein, in Appendix No. 1, are clerks and secretaries, and their situation is similar to that of the claimant in Appeals Board Decision No. P-B-417. In that decision the claimant received notice dated August 9, 1978 that the terms of her employment had been changed so that effective September 9, 1978 her work year would be on a 10-month basis. The effect of this action was that she was laid off from her normal summer work that school year. Code section 1253.3 was held not applicable and thus unemployment insurance benefits were payable to the claimant for the summer of 1979.

The claimants in Appendix No. 1 received notice in 1978 that their work year would be reduced beginning in 1978 and they received unemployment insurance benefits during the summer of 1978. In the summer of 1979 the claimant's school year was reduced further to 10 months and they filed for and received unemployment insurance benefits. The situation in 1980 remained the same and the claimants received benefits that summer. Beginning September 1980 the claimants were on a 10-month contract. At that point there was no cancellation of agreed-upon summer work as no such commitment was ever made. Certainly code section 1253.3 is applicable to their claims for benefits for the summer of 1981. We do not believe that once a school employee has been employed on a 12-month basis and the contract is thereafter changed that the employee will always remain entitled to benefits during the recess period. Thus, we distinguish and limit Appeals Board Decision No. P-B-417 to those cases involving the year in which the change in employment conditions takes place.

With respect to Appendix No. 2, these instructional aides were notified May 1, 1981 that they were going to be reemployed in the school year beginning September 1981. They had an on-going employment relationship with the employer school district. Each of them reasonably expected to return to work at the end of the summer recess period in the beginning of the next academic year. The school district also expected each of the claimants to return to work. This expectation of the employer and claimants along with their employment relationship developed over years of employment constituted a reasonable assurance that each would return. None of these claimants had a mere offer of employment; instead they had an on-going employment relationship. Their on-going employment relationship provided greater reasonable assurance of continuing employment as compared to a mere offer given to an instructional aide who lacked an on-going

employment relationship; that is, having not previously worked for the school district or having worked for the school district for only a short time. The mere remote possibility that the school district's future plans, programs, or finances might change does not negate the reasonable assurance between the parties that the claimants would return to work in the fall. To hold otherwise would be to interpret "reasonable assurance" as something substantially different from that intended by Congress when it passed the Unemployment Compensation Amendments of 1976 (see Russ v. California Unemployment Insurance Appeals Board (1981), 125 C.A.3d 834, 179 Cal.Rptr. 421). Accordingly, these claimants had reasonable assurance of returning to work and therefore are ineligible for benefits under code section 1253.3.

DECISION

The appealed portion of the decision of the administrative law judge is reversed. The claimants in Appendix No. 1 and the claimants in Appendix No. 2 are ineligible for benefits under section 1253.3 of the code.

Sacramento, California, December 16, 1982.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MARILYN H. GRACE

HERBERT RHODES

JAMES J. HAGARTY

DISSENTING - Written Opinion Attached.

DON BLEWETT

LORETTA A. WALKER

DISSENTING OPINION

We agree with the majority that the instructional aides listed in Appendix No. 2 had an on-going employment relationship which constituted reasonable assurance of return to work and thus are not eligible under section 1253.3. However, we must disagree with the majority regarding the clerks and secretaries named in Appendix No. 1.

It is important to decide whether the clerks in Appendix No. 1 fall within the provisions of Appeals Board Decision No. P-B-417. Although it may be contended that their classification changed from that of 12-month employees to 10-month employees, the more logical and reasonable approach is to examine why their employment situation changed and the nature of that change.

The change each year from 12-month employees to 10-month employees was the result of funding shortages each year. Moreover, the record shows there was a labor dispute regarding whether they should be considered 12-month employees or 10-month employees. The employer district relieved them of their duties in 1978 because of a lack of funds, and the claimants received unemployment insurance benefits during the layoff period. Again in 1979, the employer reduced the length of employment to 10 months because funds were not available and the claimants received benefits. Identically, during the summer of 1980, such employees were placed on a reduced schedule of 10 months by reason of a lack of funds, and the claimants were eligible for benefits. Once more, the same situation existed in the summer of 1981, which leads to the case before us.

By our analysis, the summer layoff of the clerks and secretaries is neither factually nor legally different from industrial layoffs resulting from temporary plant closures or shutdowns. We perceive no real difference between the situation here and the annual model changeover closures which have occurred for many years in the auto industry and in the manufacture of other durable goods.

The majority base their decision on the rationale that, because the length of employment has been reduced by the same amount each year for several years, the

employees become 10-month employees instead of 12-month employees. We cannot accept that premise. The mere fact there has been a series of reductions in length of time worked from 12 months to 10 months does not in and of itself change the status of these employees any more than do the annual plant closures and shutdowns in industrial production.

It is our conclusion that the clerks and secretaries remained 12-month employees and were unemployed in 1981 again by reason of a layoff. Therefore, they fall within the purview of Appeals Board Decision No. P-B-417 and are eligible for benefits under section 1253.3.

DON BLEWETT

LORETTA A. WALKER